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In the
Supreme Court of the United States

October Term, 1940

No. .....

SEYMOUR S. SHARP, Superintendent of Water Division No. 1, State of Wyoming, and JOHN A. WHITING, JR., Water Commissioner, District No. 14, Division No. 1, of the State of Wyoming,

Petitioners,

vs.

THE MITCHELL IRRIGATION DISTRICT, a corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI

To the Honorable, The Chief Justice, and Associate Justices of the Supreme Court of the United States:

The petition of Seymour S. Sharp and John A. Whiting, Jr., respectfully shows:

I.

That on July 31, 1940, the Mitchell Irrigation District filed in the United States District Court for the District of Wyoming its complaint against Seymour S. Sharp and John A. Whiting, Jr.; said complaint prayed for the issuance of a writ of injunction, provisional as well as perma-

nent, against your petitioners; and further prayed that said petitioners, and each of them, and their successors in office, and all persons claiming to act under their authority, be perpetually enjoined from permitting diversions and taking of water from the natural channel of the North Platte River, an interstate stream, into the headgates and diversion works of canals located above the point of diversion of the Mitchell Irrigation District's canal, except in strict order of priority at all times when the available flow is not sufficient to supply the needs of plaintiff district with the amount of its appropriation; and further prayed that petitioners, their successors in office and all persons claiming to act under their authority, be required to regulate and close, or partially close, headgates in times of insufficient water to supply all appropriations dependent thereon, so that the available supply may be taken by said appropriators in strict order of priority; respondent further prayed a temporary mandatory injunction issue during the pendency of the suit against petitioners, commanding them to divide, regulate and control the diversions and taking of water of the North Platte River so that the same may be available for diversion and use by the appropriators entitled thereto in strict order of priority. (R. pp. 3-10)

II.

In said action the jurisdiction of the Federal court was based upon the alleged diversity of citizenship, concerning which the complaint contained the following allegations:

> "1. That plaintiff is a foreign corporation organized and existing under the laws of the State of Nebraska, with its principal office and place of business in the Town of Mitchell, Scotts Bluff County,

Nebraska and is a citizen of the State of Nebraska and is an irrigation district comprising approximately 14,000 acres of land situate in Scotts Bluff County, State of Nebraska; that the defendants are residents and citizens of the State of Wyoming; that the amount in controversy in this suit exceeds the sum of Three Thousand Dollars ($3,000.00), exclusive of interest and costs." (R. p. 3)

III.

Your petitioners challenged the jurisdiction of the District Court by a motion to dismiss (R. p. 10) on the ground that the suit was in reality a suit against the State of Wyoming by a citizen and resident of the State of Nebraska, and that, therefore, under the Federal Constitution and statutes, the Federal courts were without jurisdiction. The District Court sustained the motion to dismiss on the ground that it was without jurisdiction for the reason the suit was in reality a suit against the State of Wyoming, and thereupon entered an order sustaining petitioners' motion to dismiss. (R. p. 11) Nunc pro tunc order dismissing cause of action. (R. p. 14)

The decision of the District Court was not officially published in the Federal Reporter system.

IV.

In due time the respondent appealed the case to the Circuit Court of Appeals of the Tenth Circuit, which, in an opinion, reversed the decision of the District Court and held that the action against petitioners was not a suit against the State of Wyoming and remanded said cause to the District Court with direction to deny the motion to dismiss. Said decision having been rendered by said Circuit Court on July 18, 1941. A copy of said decision may be found at (R. pp. 15-22).

STATEMENT OF FACTS

Your petitioners respectfully show that the facts upon which it bases its claim that this action is an action against the State of Wyoming and, therefore, is not within the jurisdiction of the Federal courts are as follows:

I.

That petitioner, Seymour S. Sharp, Superintendent of Water Division No. 1, State of Wyoming, is a constitutional officer under the provisions of Article VIII, Section 2, and Article VIII, Section 4, Wyoming Constitution, which are as follows:

> Article VIII, Sec. 2, Constitution of Wyoming:
>
> "There shall be constituted a board of control, to be composed of the state engineer and *superintendents* of the water divisions; which shall, under such regulations as may be prescribed by law, have the supervision of the waters of the state and of their appropriation, distribution and diversion, and of the various officers connected therewith. Its decisions to be subject to review by the courts of the state."
>
> Article VIII, Sec. 4, Constitution of Wyoming:
>
> "The legislature shall by law divide the state into four (4) water divisions, and provide for the appointment of *superintendents* thereof."

Petitioner Sharp is a constitutional official, through whom the State acts in the administration of the waters within the boundaries of the State.

In this action petitioner Sharp was sued in his official capacity as a constitutional officer.

II.

That petitioner, John A. Whiting, Jr., Water Commissioner of District No. 14, Division No. 1, of the State of Wyoming, is a State official appointed pursuant to the provisions of Chapter 26, Section 2, Session Laws of Wyoming, 1933 (Special Session), amending Section 122-302, Revised Statutes of Wyoming, 1931, and is one of the State officers through whom the State acts in the administration of the waters within the boundaries of the State; said section authorizing his appointment being as follows:

> "The governor shall appoint one *water commissioner* for each water district, who shall be selected from persons recommended by the *superintendent* of the water division in which such water district is situated with the advice and approval of the Board of County Commissioners of the county or counties, lying wholly or partly within such water district. Each *commissioner* shall hold his office until his successor is appointed and shall have qualified, and the governor shall, by like selection and appointment, fill all vacancies which shall occur in the office of *water commissioners,* and may, at any time, remove any *water commissioner* for failure to perform his duties as such *water commissioner.*"

III.

It is the duty of said petitioners, and each of them, under the Constitution and laws of the State of Wyoming, to supervise and administer the waters of the State; execute the laws relative to the distribution of water in accordance with rights of priority of appropriation and to regulate and control the storage and use of water under all permits approved by the State Engineer regardless of whether or not the said rights have been adjudicated.

CONTENTIONS OF YOUR PETITIONERS

It was the contention of your petitioners in the lower court, and it is their contention in this Court, that although your petitioners are named as party-defendants in said action the State of Wyoming is the real party to this controversy, and that the petitioners are merely an arm or agency through whom the State of Wyoming acts in the supervision and administration of the waters of the State, and that any action against said petitioners in their official capacity is in fact an action against the State of Wyoming.

REASONS WHY WRIT OF CERTIORARI SHOULD BE GRANTED

Your petitioners are advised, and so believe, that under the facts and the law of this case the decision of the Circuit Court of Appeals for the Tenth Circuit, reversing the order of dismissal for want of jurisdiction and holding that this suit is not a suit against the State of Wyoming, is erroneous and in violation of the rules, decisions and principles of law as laid down by this Honorable Court, and that this Honorable Court should require said cause to be certified to it for its review and determination under and in accordance with the provisions of the Acts of Congress in such cases made and provided, for the following reasons:

I.

Because the decision of said Circuit Court of Appeals of the Tenth Circuit is in direct conflict with the holdings and decisions of this Honorable Court in the case of Hagood v. Southern, 117 U. S. 52; Ex parte Ayers, 123 U. S. 443; Smith v. Reeves, 178 U. S. 436; Murray v. Distilling Company, 213 U. S. 151; Utah Construction

Co. v. Highway Commission of Wyoming, 278 U. S. 194; Worchester County Trust Co. v. Riley, 302 U. S. 292, and other cases cited in petitioners' brief filed herewith, each and all of which said cases hold that the court must look through form to substance in an action brought against state officers or state agencies to determine whether or not the state is the real party-defendant, even where the State is not actually named as a party to the record and that if, upon investigation, it appears that the action is in reality an action against a sovereign state then the Federal courts are without jurisdiction, save and except in those special cases where Federal questions are involved.

II.

Because the decision of the Circuit Court of Appeals of the Tenth Circuit in the case at bar is in direct conflict with the decisions of other circuit courts of appeal on the same matter, viz.: State Highway Commission in Arkansas, et al. v. Kansas City Bridge Co., 81 Fed. (2d) 689 (8th Circuit); Cargile v. New York Trust Co., 67 Fed. (2d) 585 (8th Circuit); Read, Insurance Commissioner, v. National Equity Life Insurance Co., 114 Fed. (2d) 977 (10th Circuit), and other cases cited in petitioners' brief filed herewith.

III.

Because said Circuit Court of Appeals of the Tenth Circuit in its decision refused to give any force or effect to the constitutional provisions of this State and of the statutes passed by the Wyoming legislature.

IV.

Because the decision of the Circuit Court of Appeals of the Tenth Circuit purports to be based upon certain

decisions of this Honorable Court, which said decisions hold to the contrary to the interpretation placed upon them by said court.

V.

Because the decision of said Circuit Court of Appeals decides an important question of local law, a question in which the State of Wyoming is vitally interested in a way that is in direct conflict with the decision of the Wyoming Supreme Court in the case of Hjorth Royalty Co. v. Trustees of the University, 30 Wyo. 309. In this case the Wyoming Supreme Court holds that "a suit against a department of state government or a board or corporation created by the state for governmental purposes is a suit against the state."

VI.

Because the decision of the Circuit Court of Appeals is self-contradictory in that it reverses its previous decision in the case of Read, Insurance Commissioner, v. National Equity Life Insurance Co., 114 Fed. (2d) 977.

VII.

Because the decision of said Circuit Court of Appeals would require the United States District Court for the District of Wyoming to take jurisdiction of a case and to try an action against a nominal defendant where the State of Wyoming is the real party in interest.

VIII.

In addition to the above grounds, your petitioners would also respectfully call the attention of this Honorable Court to the fact that respondent's petition does not pray for any judgment against your petitioners.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari may be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Tenth Circuit commanding the said Court to certify and send to this Court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals in the case therein entitled:

"No. 2240
"The Mitchell Irrigation District, a corporation, appellant,
vs.
"Seymour S. Sharp, Superintendent of Water Division No. 1, State of Wyoming, and John A. Whiting, Jr., Water Commissioner, District No. 14, Division No. 1, of the State of Wyoming, appellees."

to the end that said case may be reviewed and determined by this Court as provided in Section 240 of the Judicial Code, as amended by the Act of Congress of February 13, 1925, providing for certiorari to circuit courts of appeal; and that your petitioners may have such other or further relief or remedy in the premises as to this Court may seem appropriate and in conformity to said Act, and that the said judgment of said Circuit Court of Appeal in said case, and every part thereof, may be reversed by this Honorable Court, and your petitioners will ever pray.

SEYMOUR S. SHARP, Superintendent of Water Division No. 1, State of Wyoming, and JOHN A. WHITING, JR., Water Commissioner, District No. 14, Division No. 1, State of Wyoming.

By EWING T. KERR
Attorney General

HAROLD I. BACHELLER
Deputy Attorney General

ARTHUR KLINE
Assistant Attorney General

THE STATE OF WYOMING)
)ss.
COUNTY OF LARAMIE)

I, Ewing T. Kerr, do hereby certify that I have carefully examined the foregoing petition for a writ of certiorari and the allegations thereof are true, as I verily believe, and in my opinion the petition is well founded and the case is one in which the prayer of the petition should be granted by this court.

EWING T. KERR
Counsel for Petitioners.

Subscribed and sworn to before me this 27th day of August, A. D. 1941.

RUBY B. SALYER
Notary Public.

My commission expires March 25, 1943.

In the
Supreme Court of the United States

October Term, 1940

No. .....

SEYMOUR S. SHARP, Superintendent of Water Division No. 1, State of Wyoming, and JOHN A. WHITING, JR., Water Commissioner, District No. 14, Division No. 1, of the State of Wyoming,

Petitioners,

vs.

THE MITCHELL IRRIGATION DISTRICT, a corporation,

Respondent.

BRIEF IN SUPPORT OF PETITION

The order sustaining the motion for want of jurisdiction of the District Court in this case was not officially reported, but will be found at page 11 of the record. The opinion of the Circuit Court of Appeals is not yet officially reported, but will be found at pages 15-22 of the record.

QUESTION INVOLVED

The sole and only question involved in this case is the question of jurisdiction of the federal courts to hear and determine the controversy. Petitioners contend this action is in fact an action against the sovereign State of Wyoming and that, therefore, the federal courts are without jurisdiction, no federal question being involved.

In order to determine this question, it is necessary to call the Court's attention to certain provisions of the Constitution and statutes of Wyoming relative to the appointment and duties of the petitioners under the Constitution and statutes of this State.

CONSTITUTIONAL PROVISIONS AND STATUTES OF THE STATE OF WYOMING INVOLVED IN THIS ACTION

Article VIII, Section 1, Constitution of Wyoming:

"The water of all natural streams, springs, lakes or other collections of still water, within the boundaries of the state, are hereby declared to be the property of the state."

Article VIII, Section 2, Constitution of Wyoming:

"There shall be constituted a board of control, to be composed of the state engineer and superintendents of the water divisions; which shall, under such regulations as may be prescribed by law, have the supervision of the waters of the state, and of their appropriation, distribution and diversion, and of the various officers connected therewith. Its decisions to be subject to review by the courts of the state."

Article VIII, Section 4, Constitution of Wyoming:

"The legislature shall by law divide the state into four (4) water divisions, and provide for the appointment of superintendents thereof."

Pursuant to said constitutional provisions, the legislature enacted the following statutes:

Chapter 26, Section 2, Session Laws of Wyoming, 1933, (Special Session), amending Section 122-302, Revised Statutes of Wyoming, 1931:

"The governor shall appoint one water commissioner for each water district, who shall be selected from persons recommended by the superintendent of the water division in which such water district is situated with the advice and approval of the Board of County Commissioners of the county or counties, lying wholly or partly within such water district. Each commissioner shall hold his office until his successor is appointed and shall have qualified, and the governor shall, by like selection and appointment, fill all vacancies which shall occur in the office of water commissioners, and may, at any time, remove any water commissioner for failure to perform his duties as such water commissioner."

Section 122-203, Revised Statutes of Wyoming, 1931:

"Said division superintendent shall have general control over the water commissioners of the several districts within his division. He shall, under the general supervision of the state engineer, execute the laws relative to the distribution of water in accordance with the rights of priority of appropriation, and perform such other functions as may be assigned to him by the state engineer. It shall be the duty of said division superintendent to regulate and control the storage and use of water under all rights of appropriation which have been adjudicated by the board of control or by the courts, and to regulate and control the storage and use of water under all permits approved by the state engineer, whether the rights acquired thereunder have been adjudicated or not."

The most casual reading of the above constitutional and statutory provisions demonstrates that the water superintendent and the water commissioner, petitioners in the case at bar, are but the arm or agency of the State of Wyoming, created and established for the purpose of

supervising and administering the water of the State, said water under our constitutional provisions being the property of the State.

STATEMENT OF FACTS

This suit, as filed, has for its purpose the obtaining of an injunction against the petitioners, or putting it another way, the suit is designed to obstruct and interfere with the petitioners as the State's policemen in the proper performance of their official duties. The suit ultimately would divest the petitioners of discretionary powers in the administration and supervision of the waters of the State and place the same in the hands of the United States District Court for administration.

SPECIFICATIONS OF ERROR

The petitioners rely upon the following specifications of error:

The Circuit Court of Appeals erred in holding that the action is not an action against the State of Wyoming and, therefore, the federal courts have jurisdiction thereof.

The specifications of error will be discussed under the following sub-headings:

1. The findings and decision of the Circuit Court of Appeals that the action is not an action against the State of Wyoming is erroneous, being in conflict with the previous decisions of this Court and with the overwhelming weight of authority;

2. The findings and decision of the Circuit Court of Appeals that an action may be maintained against a constitutional officer and a statutory officer, an action in which neither of said officers has any personal interest,

is erroneous and in conflict with the decisions of this Court;

3. The decision of the Circuit Court of Appeals, holding that this action is not an action against the State of Wyoming, is erroneous in that it decides a question of Wyoming law in conflict with previous decisions of Wyoming courts;

4. The decision of the Circuit Court of Appeals reversed a recent decision of said Circuit Court of Appeals;

5. The decision of the Circuit Court of Appeals would compel the United States District Court for the District of Wyoming and the parties litigant to this action to do a vain and useless act.

ARGUMENT

It is the contention of your petitioners that this action is in effect an action against the State of Wyoming and, therefore, within the inhibition of the Eleventh Amendment to the Constitution of the United States.

While the State of Wyoming is not named as a party-defendant in this action, and, therefore, the lack of jurisdiction of the federal courts does not formally appear on the face of the pleadings, nevertheless, this Court has long been committed to the doctrine announced in the case of Hopkins v. Clemson Agricultural College, 221 U. S. 641, where it is said:

> "With the exception named in the Constitution, every state has absolute immunity from suit. Without its consent, it can not be sued in any court, by any person, for any cause of action whatever. And, looking through form to substance, the 11th Amendment has been held to apply, not only where the state is actually named as a party defendant on the record, but where

the proceeding, though nominally against an officer, is really against the state, or is one to which it is an indispensable party. No suit, therefore, can be maintained against a public officer, which seeks to compel him to exercise the state's power of taxation; or to pay out its money in his possession on the state's obligations; or to execute a contract, or to do any affirmative act which affects the state's political or property rights."

In support of this proposition, see the following authorities:

Hagood v. Southern, 117 U. S. 52;
Louisiana v. Jumel, 107 U. S. 711;
Ex Parte Ayers, 123 U. S. 443;
Louisiana v. Steel, 134 U. S. 230;
Fitts v. McGhee, 172 U. S. 516;
Murray v. Wilson Distilling Co., 213 U. S. 151;
Pennoyer v. McConnaughy, 140 U. S. 1;
Smith v. Reeves, 178 U. S. 436;
Lankford v. Platte Iron Works Co., 235 U. S. 461;
In Re State of New York, 256 U. S. 490;
Stanley v. Schwalby, 162 U. S. 255;
Belknap v. Schild, 161 U. S. 10;
Cunningham v. Railroad Co., 109 U. S. 446;
Utah Const. Co. v. Highway Comm. of Wyoming, 278 U. S. 194;
Hjorth Royalty Co. v. Trustees of University, 30 Wyo. 309;
State v. Field, (N. Mex.) 201 Pac. 1059;
United States v. McCallum, 281 Fed. 834;
McDowell v. Fuller, (Mich.) 135 N. W. 265, 150 N. W. 353;
Read, Ins. Commr. v. National Equity Life Ins. Co., 114 Fed. (2) 977.

In the case of Smith v. Reeves, supra, the action was against the Treasurer of the State of California to recover from him the amount of certain taxes which had theretofore been paid to him by the plaintiff. This court held that the federal courts were without jurisdiction, because the action was against the State of California. Quoting from the opinion:

> "Is this suit to be regarded as one against the State of California? The adjudged cases permit only one answer to this question. Although the state, as such, is not made a party defendant, the suit is against one of its officers as treasurer; the relief sought is a judgment against that officer in his official capacity; and that judgment would compel him to pay out of the public funds in the treasury of the state a certain sum of money. Such a judgment would have the same effect as if it were rendered directly against the state for the amount specified in the complaint."

This Honorable Court, reversing the decision of the Circuit Court of Appeals, in the case of Utah Construction Company v. Highway Commission of Wyoming, 278 U. S. 194, in which the District Court had held that a suit against the Highway Commission was in fact a suit against the State of Wyoming, said at page 199:

> "It seems to us sufficiently clear that the suit is, in effect, against the State of Wyoming. The contract for the construction of the work in question was between the Utah Construction Company and the State. The State, acting through the Highway Commission, as it might through any officer, became a party to the original agreement and obligated herself thereby. Neither the Commission nor any of its members assumed any direct or personal responsibility. The supplemental agreement was not intended to impose liability where there was none before. Its purpose,

considering the changed circumstances, was to modify in the ways specified what the original parties had undertaken to do. The Commission was but the arm or alter ego of the State with no funds or ability to respond in damages. There is no claim that the members of the Commission are personally liable. Hjorth Royalty Co. v. Trustees of University, 30 Wyo. 309; Franzen v. Southern Surety Co., 35 Wyo. 15; In re Ayers, 123 U. S. 443, 502; Hopkins v. Clemson College, 221 U. S. 636, 642; Ex parte State of New York, No. 1, 256, U. S. 490, 500;"

It is indeed interesting to note that after the above decision was rendered by the Supreme Court of the United States, the Supreme Court of Arkansas, in the case of Arkansas State Highway Commission v. Nelson Bros., 87 S. W. (2d) 394, over-ruled four of its former decisions in which the court had permitted suits against the Highway Commission.

In the case of Ex parte Ayers, supra, Ayres, who was Attorney General of the State of Virginia, had been imprisoned for contempt by the United States Circuit Court for disregarding an order of that court enjoining and restraining him from bringing certain suits as commanded by an enactment of the Legislature of Virginia. He brought habeas corpus proceedings in this Court, and this Court made an order discharging him from custody. Mr. Justice Matthews, in the course of a very exhaustive opinion in which the former decisions of the Court were reviewed, used the following language, which when applied to the facts in the case at bar, would seem to be decisive against the jurisdiction of the federal court:

"The inference is, that where it is manifest upon the face of the record, that the defendants have no individual interest in the controversy, and that the

> relief sought against them is only in their official capacity as representatives of the state, which alone is to be affected by the judgment or decree, the question then arising, whether the suit is not substantially a suit against the state, is one of jurisdiction."

and the Court further added that the Eleventh Amendment to the Constitution must be held to cover

> "not only those suits brought against a state by name, but also those against its officers, agents, and representatives, where the state, though not named as such, is nevertheless, the only real party against which alone in fact the relief is asked and against which the judgment or decree effectively operates."

In the decisions of this Court above referred to the actions were brought against natural persons as agents of the state, but the rule of law must be the same where the agency representing the state is a corporation, or a board, or a commission, or individual, as in the case at bar. This is clearly shown in the following cases:

State ex rel Gordon v. State Board of Control, (W. Va.) 102 S. E. 688;
Carpenter v. Railway Co., (N. C.) 114 S. E. 693;
Mullen v. Regents of Education (S. D.) 173 N. W. 645.

The Circuit Court of Appeals held that the federal court had jurisdiction in the case at bar because of diversity of citizenship and cites as its authority for the decision the case of Worchester County Trust Co. v. Riley, 302 U. S. 292; Read v. National Equity Life Insurance Co., 114 F. (2d) 977; Louisiana v. Jumel, 107 U. S. 711; Cunningham v. Macon & Brunswick Railroad Co., 109 U. S. 446; Hagood v. Southern, 117 U. S. 52.

With all due respect to the Circuit Court of Appeals, it is respectfully submitted that the court either misunderstood or misapplied the authorities cited in its opinion in support of the decision. It is not alleged that the petitioners acted in their individual capacities, but were performing their duties as officials of the State of Wyoming.

Let us briefly examine the language of this Honorable Court in the decisions relied upon by the Circuit Court of Appeals in holding that this action is not one against the State of Wyoming. In the case of Worchester County Trust Co. v. Riley, 302 U. S. 292, this Honorable Court said:

> "Since the proposed action is the performance of a duty imposed by the statute of the state upon state officials through whom alone the state can act, restraint of their action, which the bill of complaint prays, is restraint of state action, and the suit is in substance one against the state which the Eleventh Amendment forbids. • • •
>
> "The objection that the suit was one against the state within the meaning of the Eleventh Amendment was not urged or considered on the appeal to this Court."

The Tenth Circuit Court of Appeals has also cited, in support of its decision, a former decision of the Tenth Circuit, namely: Read v. National Equity Life Insurance Co., 114 F. (2) 977. At page 978 the Court of Appeals said:

> "Under the provisions of the Constitution of Oklahoma the Insurance Commissioner is an executive officer, charged with the duty of administering the insurance laws of the state, and is clothed with executive power in the administration of the law. His

powers are also quasi judicial. Mutual Benefit Life Ins. Co. v. Welch, Ins. Com'r., 71 Okl. 59, 175 P. 45. In the discharge of these duties it becomes necessary for him to examine applications for forms of insurance and make decisions concerning the same. As long as he acts within the provisions of the statute he is, for all purposes, the state. * * * (citing cases) and a suit against him may not be maintained in the federal courts because prohibited by the Eleventh Amendment to the Constitution of the United States."

The case of Louisiana v. Jumel, 107 U. S. 711 is likewise relied upon by the Circuit Court of Appeals in holding that the case at bar is not a suit against the State. We quote briefly from that case in which this Honorable Court stated:

"The remedy sought, in order to be complete, would require the court to assume all the executive authority of the State, so far as it related to the enforcement of this law, and to supervise the conduct of all persons charged with any official duty in respect to the levy, collection and disbursement of the tax in question until the bonds, principal and interest, were paid in full, and that, too, in a proceeding to which the State, as a State, was not and could not be made a party. It needs no argument to show that the political power cannot be thus ousted of its jurisdiction and the judiciary set in its place. When a State submits itself, without reservation, to the jurisdiction of a court in a particular case, that jurisdiction may be used to give full effect to what the State has by its act of submission allowed to be done; and if the law permits coercion of the public officers to enforce any judgment that may be rendered, then such coercion may be employed for that purpose. But this is very far from authorizing the courts, when a State cannot be sued, to set up its jurisdiction over the offi-

> cers in charge of the public moneys, so as to control them as against the political power in their administration of the finances of the State. In our opinion, to grant the relief asked for in either of these cases would be to exercise such a power."

The Circuit Court of Appeals has cited the case of Hagood v. Southern, 117 U. S. 52. On page 9 of the record it will be observed that the respondent asked to enjoin the petitioners, "and each of them, and their successors in office, and all persons claiming to act under their authority, be perpetually enjoined from permitting the diversion and taking of water * * *".

Let us, therefore, examine the case of Hagood v. Southern, supra, in which this Honorable Court said:

> "In the present cases the decrees were not only against the defendants in their official capacity, but, that there might be no mistake as to the nature and extent of the duty to be performed, also against their successors in office.
> * * *
> "The defendants in the present cases, though officers of the State, are not authorized to enter its appearance to the suits and defend for it in its name. The complainants are not entitled to compel its appearance, for the State cannot be sued without its consent. And the court cannot proceed to the determination of a cause and controversy, to which the State is an indispensable party, without its presence. This, however, the circuit court has in fact done; and its decrees undertake to dispose of the matter in controversy, and enforce the judgment of the court against the State through its officers, in a suit to which it is not a party. The suggestion that it has had the opportunity and the invitation to appear is immaterial, for it has a constitutional right to insist on its immunity from suit."

The Circuit Court of Appeals, Eighth Circuit, in the case of State Highway Commission in Arkansas, et al. v. Kansas City Bridge Co., 81 F. (2) 689, reversed the decision of the lower court on the ground that a suit against the Highway Commission of Arkansas was a suit against the State and could not be maintained without consent of the sovereignty. The court said at page 690:

> "It was as much 'the arm or alter ego of the State' as was the highway commission of Wyoming. If a suit against the Wyoming commission was a suit against the state of Wyoming, then this suit is one against the State of Arkansas, regardless of the form of the contract sued upon. The legal effect of the contract would be the same whether it stated that it was made by the state through the commission or by the commission itself. In either event, it would be a contract made and executed by an agency of the state on behalf of the state."

And again in the case of Cargile v. New York Trust Co., 67 Fed. (2d) 585, the sovereign State of Arkansas attempted to consent to be sued. The Circuit Court of Appeals, reversing the decision of the lower court, said at page 588:

> "The mere fact, therefore, that the defendants are officers or agents of the state, does not in itself place them beyond the reach of equitable power. Immunity from suit is an attribute of sovereignty which cannot be invoked by public officers when sued for their own wrongful act, even though such acts might be committed under color of an unconstitutional statute. Individual officers of a state do not constitute a privileged class, but are amenable to the law, and they cannot interpose the shield of the Eleventh Amendment. If, however, the officer is merely a nominal

> defendant, and the state is the real party in interest, then the suit is in substance one against the state, and cannot be maintained. * * * (Many cases cited)

At page 589 the court said:

> "Having held in the instant case that the suit is one against the state, the jurisdiction of the federal court must fail, even though the state of Arkansas had waived its immunity and consented to be sued. The suit being, in effect, one against the state, the officers named are simply nominal parties."

The United States District Court for the District of Wyoming has had this identical question before it on numerous occasions, the first decision being rendered in the case of Fidelity and Deposit Co. v. Trustees of the University, 16 Fed. (2d) 150. At page 151 the court said:

> "The case at bar, upon its face, is not a suit against the state, but against one of its authorized agencies, which opens up a field very prolific of judicial interpretation by the federal courts. All suits against state officials are apparently not in contravention of the Eleventh Amendment, as some suits have been held to be permissible and others not. The Supreme Court through a series of decisions have attempted to draw a line of demarcation between these two classes of suits, which affords a rational basis for the decision of a case of this character, if one is able to classify the suit at hand. In one class, where suits are brought against officers of the state to compel them to carry out their contractual obligations, it has been held that such a suit is one against the state and cannot be maintained. In the other class, where suit is brought to restrain officers of a state from committing some wrong or injury in violation of a right, or under color of an unconstitutional statute, it has been held that such a suit may be

maintained, upon the theory that the wrong or illegal act is not an act of the state, but a personal act on the part of the officials."

In the case of Utah Construction Company v. State Highway Commission, 16 Fed. (2d) 322, which said decision was later affirmed by this Honorable Court, heretofore referred to in this brief, the court said at page 325:

"Is the action upon a contract, such as here outlined under the Constitution and statutes referred to, one in effect against the state of Wyoming, or one against a separate entity created by the state, so as to take it out of the class of cases held to be against the state? The Supreme Court of Wyoming, in Hjorth Royalty Co. v. Trustees of the University, 30 Wyo. 309, 222 Pac. 9, it being a suit to quiet title to lands, held that the state was the real party in interest, that the suit in effect was one against the state, and that, in the absence of legislative consent to suit, it could not be maintained."

As heretofore pointed out in this brief, the State of Wyoming is the owner of the waters within the boundaries of the State. Article VIII, Section 1 of the Constitution of Wyoming provides:

"The water of all natural streams, springs, lakes or other collections of still water, within the boundaries of the State, are hereby declared to be the property of the State."

The Supreme Court of the State of Wyoming has held that there is no distinction between a suit against the State and one against its property. We quote from Hjorth Royalty Co. v. Trustees of the University, 30 Wyo. 309, 222 Pac. 9:

> "It has been held that for the purpose of jurisdiction there is no distinction between suits against the government directly, and suits against its property. * * * 'A suit against a department of the state government of a board or corporation created by the state for governmental purposes is a suit against the state, and cannot be maintained without its consent, but such a suit may be maintained when authorized by statute, as where the statute creating the corporation provides that it may sue and be sued.' 39 Cyc. 919"

In the case at bar it is clear that the suit has for its purpose a determination by the United States District Court the manner and means in which the State's property shall be supervised and administered by its officials. The overwhelming weight of authority cited in this brief is conclusive that the object and purpose of the action comes clearly within the inhibition of the Eleventh Amendment to the Constitution of the United States.

In 1935 an action was instituted in the Nebraska courts by the State of Nebraska against the respondent in this case to compel it to comply with the laws of the State of Nebraska. More imperative language could hardly be used by a court in defining the rights of respondent as was used by the Supreme Court of the State of Nebraska in the case of State v. Mitchell Irrigation District, 262 N. W. 543. We quote from the decision:

> "These appropriators are all in Nebraska. Clearly, the state of Wyoming would have no authority to administer the water, after they come into this state, and control their use. If the contention of defendant is sound it would leave the defendant in absolute control of the waters which it takes from the river, without regard to the rights of prior appropriators,

> and no state and no court would have any authority to interfere to compel it to use the waters for a beneficial purpose."

In the light of the language of the Supreme Court of the State of Nebraska holding that the water officials of Wyoming have no authority to administer the water after it comes into the state of Nebraska, nevertheless, the case at bar has for its purpose to force the officials of the State of Wyoming to do exactly what the Supreme Court of Nebraska has said they cannot do. The issuance of an injunction in this matter would leave the administration of the waters of the North Platte River in this particular locality in such a hopeless and confusing state of affairs that the officers would be required to obtain a decision from the United States District Court before any ministerial act could be performed; they would be divested of discretion and would falter in their duties, all of which would retard development and encourage inefficiency in the administration of the waters of the North Platte River and defeat the laws of this State that water must be applied for beneficial purposes.

Your petitioners in the case at bar are administrative officers, whose duty it is to carry out the police power of the State. In an early decision of the Supreme Court of Wyoming, Ryan v. Tutty, 13 Wyo. 122, 78 Pac. 661, the court laid down the rule and defined the duties of the water superintendent and water commissioner:

> "Primarily, the commissioner is authorized, whenever legally called upon, and it is his duty, to see that the water of a particular stream is diverted in accordance with the established priorities, and to prevent anyone from taking more water than he is entitled to take to the injury of others. He is not

authorized to determine priorities. But in regulating the distribution of the water it may become incidentally necessary for him to ascertain for that purpose alone whether, and to what extent, a prior appropriator is injured by a diversion above him on the same stream or a tributary. The only object of his inquiry is that he may justly and fairly make a temporary distribution of the water in conformity with the adjudicated priorities. We perceive nothing in the statute, or in the nature of his duties, that renders a decision on his part in the premises a permanent adjudication of the matter, or that even prevents him from changing his decision when again called upon to perform similar duties should he conclude that he had previously acted erroneously."

Thus it will be seen that under the decision of our Supreme Court the petitioners are not authorized to determine priorities; they can investigate and determine to what extent, if any, an earlier appropriator is injured by the use of water above him; they are given broad powers and wide discretion in the administration of the waters of the State to the end that the same may be used to the most beneficial purposes.

The Supreme Court of the State of Wyoming, in the case of Irrigation and Power Co. v. Grant, 44 Wyo. 392, 13 Pac. (2d) 235, discussed fully the question of the water superintendent and the water commissioners as being State officials and their duties as policemen of the State. The court said:

"We shall, then, consider the view taken by the lower court, as above stated, and the correctness of which is strenuously contended for by the plaintiff. The water commissioner acts simply as an administrative officer in carrying out the police power of the state. Van Buskirk v. Live Stock Co., 24 Wyo. 183, 156 Pac.

1122; Hamp v. State, 19 Wyo. 377, 118 Pac. 653; Parshall, State Engineer v. Cowper, 22 Wyo. 385, 143 Pac. 302; Ryan v. Tutty, 13 Wyo. 122, 78 Pac. 661.

Again in the case of Hamp v. State, 19 Wyo. 377, 118 Pac. 653, the Supreme Court said:

> • • •
>
> "That the state may supervise and control the appropriation, diversion and distribution of the public waters, and impose that duty upon administrative officers, is settled by our former decisions and is equally well settled in other states, where the doctrine of prior appropriation of water prevails."

In the case of Parshall, State Engineer v. Cowper, 22 Wyo. 385, 143 Pac. 302, the Supreme Court of Wyoming held that as long as water commissioners and superintendents are exercising sound discretion and reasonable care they are not subject to control by the courts. The court said:

> • • •
>
> "The volume of water to which an appropriator is entitled at any particular time is that quantity, within the limits of the appropriation, which he can and does apply to the beneficial uses stated in his certificate of appropriation. It may be more at one time than at another; and, as we understand the statute, it is for the purpose of regulating the quantity from time to time to which an appropriator is so entitled that the Water Commissioner is given authority to close or partially close a headgate so as to prevent waste of water, and to secure to prior appropriators the quantity of water to which they are entitled; and in the performance of his duties and while exercising a sound discretion and reasonable care in so doing, he is not subject to control by the courts."

CONCLUSION

The decision of the Circuit Court of Appeals, in the case at bar, if unchallenged and unreversed, becomes the law of the case, and thereby compels the State of Wyoming, in an action brought against it by a citizen and resident of the State of Nebraska, to submit herself to the jurisdiction of the federal courts, in contravention of the provisions of the federal constitution and statutes and in violation of the policy of said state as expressed in its own statutes and in the decisions of its Supreme Court. We submit that the petition for writ of certiorari should be granted and the cause reviewed by this Honorable Court.

Respectfully submitted,

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APPENDIX

The following are those portions of the Constitution of Wyoming and the Revised Statutes of Wyoming, 1931, which have a material bearing upon the questions under discussion:

ARTICLE VIII, Section 1, Constitution of Wyoming: "The water of all natural streams, springs, lakes or other collections of still water, within the boundaries of the state, are hereby declared to be the property of the state."

ARTICLE VIII, Section 2, Constitution of Wyoming: "There shall be constituted a board of control, to be composed of the state engineer and superintendents of the water divisions; which shall, under such regulations as may be prescribed by law, have the supervision of the waters of the state and of their appropriation, distribution and diversion, and of the various officers connected therewith. Its decisions to be subject to review by the courts of the state."

ARTICLE VIII, Section 4, Constitution of Wyoming: "The legislature shall by law divide the state into four (4) water divisions, and provide for the appointment of superintendents thereof."

Chapter 26, Section 2, Session Laws of Wyoming, 1933 (Special Session), amending Section 122-302, Revised Statutes of Wyoming, 1931:

"The governor shall appoint one water commissioner for each water district, who shall be selected from persons recommended by the superintendent of the water division in which such water district is situated with the advice and approval of the Board of County Commissioners of the county or counties, lying wholly or partly within such water district. Each commis-

sioner shall hold his office until his successor is appointed and shall have qualified, and the governor shall, by like selection and apointment, fill all vacancies which shall occur in the office of water commissioners, and may, at any time, remove any water commissioner for failure to perform his duties as such water commissioner."

Section 122-203, Revised Statutes of Wyoming, 1931:

"Said division superintendent shall have general control over the water commissioners of the several districts within his division. He shall, under the general supervision of the state engineer, execute the law relative to the distribution of water in accordance with the rights of priority of appropriation, and perform such other functions as may be assigned to him by the state engineer. It shall be the duty of said division superintendent to regulate and control the storage and use of water under all rights of appropriation which have been adjudicated by the board of control or by the courts, and to regulate and control the storage and use of water under all permits approved by the state engineer, whether the rights acquired thereunder have been adjudicated or not."